

G. Jones
8

OBSERVATIONS
ON THE
LAW OF TREASON;
WHEREIN IT IS ATTEMPTED TO BE SHEWN,
THAT
CONSPIRING
TO
LEVY WAR IS NOT TREASON
BY
THE LAW OF ENGLAND.

ID CAPUT UBI HÆC CONTROVERSIA EST NOTAVI ET DE-
SCRIPTUM TIBI MISI EGO TAMEN SCHOLÆ ET
TESTÆ ASSENTIOR.

Cic. ad. Treb. Ep. Fam. L. vii. E. xxii.

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P R E F A C E.

I WILL not dissimble, that I publish these Observations not so much for the sake of lawyers or professional men, as for the public at large. It is proper that persons, who may be called upon to serve on juries, and decide as supreme judges, on accusations of treason, should know how the law stands upon this important subject. Their determination involves the life or death of a fellow creature, and they should weigh well the grounds on which they pronounce his guilt. Nor let them imagine that the question here discussed is entirely out of their province: they may exercise a jurisdiction over the law as well as the fact; and where they are satisfied that the evidence against the prisoner does not amount to the crime laid in the indictment, they ought to acquit him.

They should listen to the judges; listen to them

P R E F A C E.

with attention, but with caution. Judges have too often lent themselves as instruments to serve the interests and passions of a court; and the history of almost every reign records their iniquities. Scaffolds have, in former times, streamed with the blood which they have shed; and, as long as a Jefferys is remembered, a prudent jealousy will mix itself, I trust, in the minds of Englishmen, with the respect which is due to their high station.

Nor let juries forget, that the jurymen who found Sydney guilty, are remembered as well as the judge who pronounced his sentence; and as they shared in his crime, they partake in his infamy.

OBSERVATIONS

ERRATA.

Page 5 line 6, from bottom; r. evil design, in this, &c.

OBSERVATIONS

ON

THE LAW OF TREASON.

THE three principal branches of the 25th of Edward III. are these; compassing the king's death, levying war against the king, and adhering to the king's enemies. Any overt act falling under any one of these three heads is an act of treason, and subjects the offender to the penalties of that atrocious crime.

It is agreed by all writers on the subject of law or government,* that stretching the law of treason beyond its just limits, is one of the strongest circumstances and indications of tyranny; and if any thing can be considered as obnoxious to this animadversion, it is forced and arbitrary constructions of a statute expressly intended, as ap-

* Vid. particularly Montesquieu,

appears by the preamble, to ascertain and define the several kinds of treason, and solve all doubts and uncertainties respecting this most important article of legislation.

Justinian denounces the punishment of forgery against those rash civilians, who, by false glosses and interpretations, should endeavour to warp or pervert the meaning of his laws. I think most of the modern writers on the statute of Edward III. have been guilty of the crime so strongly provided against by the Roman emperor, though there is unfortunately no law in our statute book by which they could have been punished. The act of Edward III. is penned with great clearness and precision, and was dictated by the mildest and justest spirit of legislation. But under the interpretations of it, which now prevail, its purpose is in a great measure defeated, the harmony and symmetry of its several parts entirely broken. This I shall endeavour to evince, by shewing how the first and principal article of it, (compassing the king's death) has been shamefully stretched and extended. Compassing and imagining the king's death, which are the words of the statute, in their plain obvious meaning, are confined to an intention or design of depriving the sovereign of his natural physical life. But by a construction sufficiently forced and arbitrary, the writers on this subject

ject have extended it to all plans or designs of imprisoning the king, or even of removing evil counsellors from about his person. I would not be understood to wish to palliate these crimes by the expressions I have made use of. They are indeed atrocious offences against the peace and good order of society, and very justly, perhaps, made obnoxious to the penalties of high treason. But I cannot help thinking that it is a departure from the rigorous and strict rules of construction, which ought to obtain in Cases of this kind, to include them under this head of the statute of Edward III. This interpretation, however, is of great antiquity and authority : it is not directly against the spirit and meaning of the act ; it is maintainable by colourable arguments and analogies of law.

The word king, is not only the name of a person, but of a magistrate ; and to imprison him, or impose any personal restraint or coercion upon him, is a destruction of his political existence*.

But

* I mention this argument as plausible, but would not be understood entirely to subscribe to it. I think a special act of parliament is necessary to give the conclusion arising from it its full and compleat sanction. The argument itself hinges too much, as it appears to me, on figure and metaphor.

It was the observation of Selden, that the Roman catholic doctrine of transubstantiation had arisen from a whimsical con-

But the construction upon which I mean next to animadvert, has not this, nor any thing like this, to plead in its justification. It multiplies treasons against all sense and reason. It confounds what the framers of the statute have accurately distinguished, and goes upon this modest assumption, that they have taken great pains to discriminate what in reality is exactly the same thing. It destroys one of the characteristic features of the act. It is besides of recent origin, contrary to the highest authorities in our law, and even to what may be considered as express declarations of the legislature.

The construction to which I allude, is that whereby the levying of war against the king, and adhering to the king's enemies, which are mentioned by the statute as distinct kinds of treason, are all crowded together under the head of compassing the king's death, being considered as overt acts to that effect which may be so laid in an indictment. This has given rise to a new descrip-

version of Rhetoric into Logic. Certain it is, that this has been an abundant source of absurdity and unrighteousness in all ages. Thus numbers were executed under the Roman emperors, Honorius and Arcadius, on the authority of a bold swaggering figure of a speech, which incorporated the emperor's privy counsellors with the person of the emperor himself. Vid. Cod. 9, 8, 5, nam & ipsi pars corporis nostri sunt.

ject

tion of treasons, for which there is certainly no authority in the words of the statute, and as I apprehend in its meaning and intention. Compassing and imagining to levy war, or to adhere to the king's enemies, is hereby made treason, as well as to deprive him of life under the elegant fiction of compassing to compass the king's death. For we are told, that, levying war is an act of compassing—Conspiring to levy war, can be nothing else than compassing* to levy war, which brings it exactly to what I mentioned; an act of compassing to compass the death of the king: and yet the writers who contend for this rule of construction, shall specify, as one of the distinguishing and characteristic circumstances of this statute, the extraordinary provision which it interposes for the personal safeguard and protection of the sovereign; for whereas, in other cases, it attaches the guilt and penalties of treason to the actual accomplishment only of the evil design. In this, on account of the deep interest which the community has in the safety of its first magistrate, it takes the will for the deed, and, when it is sufficiently evinced and manifested, punishes it with equal severity.

* Compassing or conspiring to levy war. Cook, vid. post.

+ Vid. Particularly Sir M. Foster's Discourse on the law of Treason.

This distinction, which is indeed clearly marked and expressed in the statute commented upon, vanishes before the abovementioned interpretation. All these different kinds of treason are thereby put upon a level. The intention to levy war is made treasonable, as well as the intention to murder the sovereign, contrary to what the interpreters themselves tell you is the spirit and meaning of the statute.

But further it may be asked, if the levying of war is an overt act of compassing, why did the legislature mention it as a distinct kind of treason under an article apart? It speaks of overt acts of compassing. It speaks, besides, of levying war. Why this complex phraseology? Would it not have been more simple to reduce all treasons of this description under the single head of compassing the death of the king? If it was intended, by way of example, to shew what was meant by an overt act of compassing, would it not have made use of some form of expression significant of such an idea?

But it has often been remarked, to the praise of this statute, and as evincing the high wisdom of those who framed it, that it forbears to specify or define what shall be deemed an overt act under the several heads of treason it embraces, but leaves the whole determination of this point to the jury who

who shall try the cause. So that in reality this construction strips the statute of every thing that is peculiar to it, or has been considered an indication of its wisdom. It defeats its end, destroys its character, extinguishes its spirit, and is at war with the just fame and reputation of those who framed it.

There is another point, in respect of the statute itself, I must yet take notice of. So provident was the legislature, in a case of such extreme concern to the lives and fortunes of individuals, that distrusting, as it were, the accuracy and precision of its own performance, or afraid, at least, that it had not made use of language sufficiently strict and narrow to circumscribe its ideas, or foreseeing that the irresistible propensity of lawyers to evade by distinctions, and supply by construction, would be at work upon its labours, and add to the catalogue of treasons, as they had done before, it has inserted into this memorable act the following clause and provision.

“ And because that many other like cases of
 “ treason may happen in time to come, which a
 “ man cannot think or declare at this present time;
 “ it is accorded, that if any other case, supposed
 “ treason, which is not above specified, doth hap-
 “ pen before any justices, the justices shall tarry,
 “ without any going to the judgment of the trea-
 “ son,

“son, till the cause be shewed and declared, before the king and his parliament, whether it ought to be judged treason or other felony.

One would have thought, that after so clear and specifick a direction, judges would never have ventured to multiply treasons from their own authority, but have referred every doubtful point, or every point that did not fall within the strictest import of the words used by the statute, to the pre-eminent powers and jurisdiction of the legislature.

Parliament seems to have foreseen that many cases might occur which should be deemed to fall within the reason, though not within the words of the act. It was justly cautious of leaving this argument of analogy, or parity of reason, in the hands of the judges; for in their hands, experience had shewn it was wonderfully prolifick. To the legislature it refers it. It alone can extend, where there seems cause of extending. It alone can accommodate the law to the exigency of eventual cases. It alone could bring the act of conspiring to levy war within the compass of the law of treason.

Thus far I have taken the text itself as my guide, in commenting upon it. I have examined it by rules of construction, which have their foundation in reason and common sense, and have been admitted in all ages, without denial or contradiction from any quarter, as the true principles which should govern

govern our understanding of penal statutes. Against such rules of construction, fairly applied and carried on by just logical deductions to a determinate conclusion, no weight of authority, or number of contrary decisions, can be of any avail. In determining what is *common law*, we must bow implicitly to a regular and uniform series of judicial resolutions upon any litigated point, for they are the only standards or criterions to which we can refer the matter in dispute; since, however, writers may occasionally deduce common law from immemorial usage and custom, it is, in reality, nothing else than the embodied decisions of our courts of justice.

But this is not the case with statute law. Here we have a positive unimpeachable evidence, which is capable of speaking for itself. Here we have before us a document of superior authority, to which all commentaries and commentators must submit. We have a touch-stone whereby constructions and interpretations may be tried, and fair reasonable conclusions distinguished from the flimzy evasions of a deceitful sophistry. Here, according to the pithy maxim of our law, *judicandum est legibus non exemplis*. Precedents may indeed solve an ambiguity, or explain a doubtful point; but ought not, and cannot prevail against the express decisions of unsophisticated reason.

The

The clamours of lawyers and judges cannot drown the voice of the legislature, distinctly and articulately speaking. In the hurry of passion, or influenced perhaps by worse motives, courts of justice may determine against us; but we have the act of parliament in our hands, and we may appeal to a tribunal which exercises its jurisdiction over the accusers as well as the accused; the judge who hangs, as well as the * criminal who is hanged; the tribunal of reason and justice.

These observations I thought it proper to premise, before I entered upon that part of the argument which turns upon authority; and it may be deemed something like a voucher for their truth, at least for the sincerity with which they are delivered, that they do not arise from the spur of the occasion, or the immediate purpose of my ar-

* Criminal is here used in the sense of an accused person. This is its original proper acceptation, as the reader will see if he takes the trouble of consulting Johnson's Dictionary. It is derived from *crimen*, which, in pure latinity, signifies not a crime, but an accusation. This sense of the word should be supported, for then it will answer to the *reus* of the Romans, or, *Ille de quo res agitur*, and in narrations of judicial proceedings we shall be able to avoid inelegant circumlocutions. I was led to this note, by an observation which I heard drop in private society from the greatest man now existing,

gument;

gument; for I contend, and am not without hopes of proving, that the weight of authority is strongly on my side. Modern precedents are indeed against me; but the chain (which is not without a considerable break or interruption) may be followed up to a determinate point of time. It may be shewn where it begins. We may be let into the bottom of the system, and narrowly survey the foundations upon which the whole mighty superstructure rests. It is not a series of precedents running up immeasurably into the depths of time, and baffling all attempts to ascertain its commencement. I flatter myself, I shall be able to point out, with precision, where the old doctrine ends, and where the new one begins.

To commence with the old doctrine:—The most ancient writer of any authority, who has treated expressly on the subject of Crown-law, subsequently to the reign of Edward the Third, is Justice Stanford, who was on the Bench, if I mistake not, in the reign of Q. Mary. His *Pleas of the Crown*, is a work of merit, and mentioned with approbation by Foster. I have carefully perused his chapter upon treason, and cannot find the least mention of conspiring to levy war as falling under that denomination. But I find particulars in it which convince me that the
very

very contrary is law under the statute of Edward the Third. In confirmation of the preamble of that act, which is in these words: "Item, "Whereas divers opinions have been before this "time in what case treason shall be said, and in "what not." He shews you, that a multiplicity of treasons had been raised before that time, by the fruitful sophistry of lawyers, in departure from the great principles of reason and justice, which which are at once the sources and criterions of our common law*.

Thus, to kill the king's father, or messenger, or one who was about to assist him in his wars, were construed to be treasonable offences, upon the fictitious notion, that all such acts were indirectly aimed at the person of the sovereign; the same inauspicious doctrine which in later times has given rise to the rule of construction I would re-

* This may afford little critics some room for cavilling, as inconsistent with what was said in a former page. But the apparent inconsistency will vanish, if the reader considers, that the decisions of judges are, indeed, the immediate criterions of the common law; but that reason and justice did, or ought to have dictated those decisions. Nothing is common law, or law at all, which is directly against reason; though, where the specific reason does not immediately appear, we may, notwithstanding, in certain cases, be brought to acquiesce in the practice of our ancestors, and such an acquiescence is reasonable.

probate.

probate. But among these, and others of the same sort, he mentions certain acts analogous, as it should seem, to the conspiring to levy war, as exciting sedition* in the realm against the king, and stirring up mutiny in the king's armies, and gives you two paragraphs out of Granville and Bracton, wherein they are expressly brought within the compass of the treason laws. Now the act of Edward the Third was framed for the declared purpose of discriminating between the received opinions upon this interesting subject, of confirming some, and rejecting others. That there was an opinion maintained by two of the greatest law writers before that time, making it high treason to do what would now be called *conspiring to levy war*, is evident from the passages cited in Stanford†. There are no words in the

* Si quis machinatus fuerit, vel aliquid fecerit in mortem regis, vel seditionem regni, vel exercitus, vel consenserit, &c. Gran. lib. 14. fo. 110. Si quis ausu temeraris machinatus sit in mortem regis, aut aliquid egerit vel agi procuraverit ad seditionem Domini regis, vel exercitus ejus, &c. Bract. lib. 2. Tit. de crimine læsæ majestatis.

I have no doubt that the Seditio Regni of Granville, and the Seditio Domini Regis of Bracton, joined as they are to the crime of compassing the king's death, are tantamount to the act of levying war against the king.

† Stanford, Plees del Corone, c. 1. p. 2.

statute

statute sanctioning this opinion: it rejects it therefore; for, unless it be supposed to reject what it does not confirm, it does not answer its avowed end, that of deciding on the discordant sentiments which prevailed at the time of its enactment, but leaves matters as dubious and uncertain as they were before.

Conspiring to levy war must, therefore, be included in the rabble of constructive treasons, which the statute was intended to put to flight; and probably the legislature thought it had crushed it for ever. But how ineffectual the wisest and best-concerted provisions, when avarice and ambition set their wretched votaries at work to elude them. Under this very statute, two men, in a neighbouring country, have been found guilty of a description of treason, which the framers of it had it in their immediate contemplation to proscribe; and in prosecution of this righteous sentence they will, in all likelihood, be shortly delivered over to a cruel and ignominious death!

The next writer of eminence, in the order of time, upon this branch of jurisprudence, is Sir Edward Coke, the great oracle of English law; a man who brought to the composition of those works wherein he has deposited the accumulated labours of a long and studious life, a mind at once acute and comprehensive, stored with erudition,

tion, but not encumbered by it, wielding the masses it had gathered together with the activity and dexterity of superior genius; a mind which had left no part of jurisprudence unexplored, collecting the materials of its knowledge from the most distant and least accessible sources, as well as from those that were more obvious; penetrating by the most rugged roads into the darkest recesses of antiquity, and pursuing its painful researches through every obstacle of obsolete idioms, and unremembered customs and manners. It is true, his stile is often quaint, but it is always clear, expressive, energetic, and vigorous. There is a crust of antiquity about it which pleases me: I regard it with the same reverence as Cicero did the obsolete phrases of the twelve tables, which have something of dignity, he observes, joined with simplicity; and though they may disgust a fastidious sciolist, are not without their secret charm for men of real judgment and taste. Sir Edward Coke, in fine, was a man who disputed the palm of genius with Lord Bacon, *and far surpassed him in probity and integrity*. In his judicial capacity he was stubborn and inflexible in right, and he chose rather to be dismissed from his office, than violate the sanctity of his oath. He threw himself into the breach, when the citadel of English liberty was attacked, and brought into play,

play, in a just cause, the gigantic powers of his genius and learning. In conjunction with the great Selden, he drew up the petition of right, and in all his works (forgive some courtly passages) may be traced the freeborn spirit of an Englishman, and that proud attachment to the ancient hereditary rights and privileges of his country, which characterizes a constitutional lawyer. It should seem, that in a question which involves life or death in its issue, and wherein, therefore, every doubt should be admitted in favour of the accused person, the bare authority of so eminent a lawyer and grave a magistrate as Sir Edward Coke, should alone be sufficient to determine the scale in favour of mercy. But when this authority comes down to us, backed and supported by arguments, and when those arguments appear unanswerable, what is it, it may well be asked, that shall countervail this concurrence?

I shall transcribe the words of this illustrious judge, as I find them in his 3d Instit. c. 1. p. 14.

“The composition and connection of the words
 “are to be observed, viz. (—— thereof be at-
 “tainted by overt deed.) This relateth to the
 “several and distinct treasons before expressed
 “(and specially to the compassing and imagina-
 “tion of the death of the king, &c. for that is
 “secret in the heart) and therefore one of them
 “cannot

“ cannot be an overt act for another. As, for
 “ example; a conspiracy is had to levy war: this
 “ (as hath been said, and so resolved) is no trea-
 “ son by this act, until it be levied, therefore
 “ it is no overt act, or manifest proof of the
 “ compassing of the death of the king, within
 “ this act; for the words be (de ceo, &c.) that is,
 “ of the compassing of the death. For this were
 “ to confound the several classes, or membra di-
 “ videntia & sic de cæteris.”

His reasoning is conclusive. Such a construction
 confounds the several parts or distributive members
 of the statute, and makes compassing to compass
 the king's death treason, when the express words of
 legislature confine that denomination to the com-
 passing the king's death. There is a marginal
 note to this passage, “ So resolved by the justices.
 “ Pasch. 35 Eliz. which we heard and observed.”
 So that this is not the bare assertion of a single
 judge, however eminent, but a solemn judicial
 determination, emanating from a tribunal com-
 petent to decide.

Lawyers and Judges, since the revolution,
 should blush to find a more liberal spirit of con-
 struction prevailing in an arbitrary reign, before
 the principles of civil and political liberty were
 well defined or understood, than they themselves
 have been inclined to adopt, under the mild aus-

pices of a family* which, I trust, will never forget that their title and the rights of people are inseparably interwoven, and that the latter cannot be denied without the former's being virtually impeached.

In two different places of the same chapter, this proposition is further inculcated and enforced. "A compassing, or conspiracy to levy war, is no treason, for there must be levying of war in fact." p. 9. Again, p. 10. "By the stat. 13 Eliz.

* If, indeed, we were to suppose so improbable a case, as that a prince of the House of Brunswick should ever forget the obligations he lies under to his people, and pursue measures, or harbour sentiments, inimical to their liberties, the atrocity of his crime would far exceed any thing which may be charged on the worst of the Stuarts. He would stand convicted of the blackest perfidy and ingratitude. The Stuarts could trace their title to the crown through a long line of Royal ancestors which lost itself in the obscurity of time. The memory of an original popular grant, if any such ever took place, was obliterated by length of duration, and the loss or destruction of all vouchers and records. But a century is not yet elapsed since the people of this country, by a free and voluntary act, transferred one of the richest crowns in the universe from its former lawful proprietor, to the person from whom George the Third derives his right to the obedience of his subjects. The deed of conveyance is recorded in our statute-book. The act was too solemn and well attested ever to be forgotten; and while it sanctifies the power, it proclaims the duties of a sovereign of these realms.

" it

" it is enacted, declared, and established, that
 " during the natural life of Q. Elizabeth, if any
 " within the realm, or without, should compass,
 " imagine, invent, devise, or intend to levy war
 " against her majesty, within this realm, or with-
 " out, and the same declaration by writing or
 " word, &c. that it should be high treason. So
 " during the natural life of the queen, a conspiracy
 " to levy war was high treason, though no war was
 " levied; and upon that law Bradshaw, Burton, and
 " others, were attainted of high treason, for conspi-
 " racy only to levy war; but it was resolved by all
 " the justices, that it was no treason within the sta-
 " tute of 25 Edward the Third, as hath been said.
 " The words in this statute are, *levie la guere.*"

To the first part of this passage, there is this
 marginal note: " The indictments and attainders
 " of treason, by force of this statute, are no more
 " to be followed, because the statute which made
 " them treason is expired." I must observe, that
 one of the most strenuous advocates for the rule
 of construction, which is here combated, is Sir
 Michael Foster; but tho' in this case he is fa-
 vourable to prerogative, on another important and
 much litigated question, he espouses the popular
 side; for he is decidedly of opinion, that words
 unconnected with acts, do not constitute treason.
 He builds chiefly, as he tells us himself, on tem-

porary acts of parliament, which had made the words therein set forth, felony or misdemeanor, and informs us, that the same conclusion had been drawn by others from acts which make words in certain cases treason.

The latter scheme of reasoning, he does not seem to disapprove of, though he thinks his own the more conclusive: and, indeed, it is hard to say upon what grounds he could have objected to it. For there cannot, in the nature of things, be a stronger presumption, that in the apprehension of those who framed the temporary acts, there was no permanent law attaching certain penalties to a described offence, than that they should deem it necessary to inflict those penalties by a *special* law, to operate only within a limited time; if there existed such a permanent law, the temporary act must have been a declaratory statute. Now, in this case, what did it declare? It declared, that there was in being a perpetual law, which perpetual law it declared should be considered as law only within a limited time. This is evidently either downright nonsense, or it is, in fact, a repeal of the perpetual law after the time limited for the continuance of the temporary act should be elapsed.

I know only one method by which this dilemma can be eluded, which is by supposing the legislature declares to you the law; but after a certain

tain period, leaves you where it found you. But the law, before the declaratory statute was clear, or it was not. If it was clear, I shall not merely argue that parliament interposed unnecessarily, but that it interposed for the express purpose of doing mischief; since such a temporary act could have no other effect, than to create doubts where none existed before. If the law was not clear, then how does the matter stand? Thus: the legislature expressly tells you, that it will remove your doubts for a time, but though the matter be of the highest importance, it ordains, that no sooner shall that time have elapsed, than obscurity shall return, where at its fiat, light might have been continued.

An act, so wanton and absurd, cannot in decency be attributed to an assembly invested with the highest powers of the state, and which is supposed to represent the wisdom, as well as the authority of the nation. It follows from these reasonings, that Mr. Justice Foster, could not on the grounds of sound logic, have disapproved of the mode of argument which he observes had been applied by others for the purpose of establishing the same conclusion as he arrived at by another way of considering the subject. If so, I may be allowed to turn against that able writer the weapons with which he himself has furnished me, and oppose his doctrine by a process of reasoning,

which, in another case, he seems to admit as good and valid; or which, at all events, he must have been forced to admit as such, since it might be proved in some respects, to have the advantage of that which he expressly uses, and declares to be unanswerable.

Temporary acts have been made at different times, attaching the guilt and penalties of high treason, to the circumstance of conspiring to levy war. Sir Edward Coke, in the passage above quoted, mentions one that was passed in the 13 Eliz. and expired with her life. A law to the same effect was passed in the 13th year of Charles the 2d.

These two are the only temporary acts* I have been able to meet with upon this subject. There are others of a different description, which at the time of their enactment were intended to operate as perpetual standing laws of the realm, some since repealed, others still in force, which it will be proper to consider, as they throw no small light on the present question, evincing the notions of parliaments in remote times, with respect to this identical offence of conspiring to levy war.

In the reign of that rash and ill-fated prince Richard II. a false principle prevailing, that the
best

* I will not answer for there being no more. These I thought sufficient for my purpose, and I was not very solicitous to add to the number. I confess I am not excessively partial to a certain knack which gentlemen have of appearing prodigiously learned, by heaping quotations upon quotations, and precedents upon precedents, at the same time that they do not know how to methodize them into order, or digest them into principles.

best way of securing the throne, was, to raise round it a high fence of pains and penalties; a law was passed,* which, among other extentions of the statute of Edward III. makes it treason to conspire to levy war. It was not long before this misguided monarch experienced, that loyalty, among a free people, is not to be forced up by the terrors of penal laws; but, in order to be lasting, must be the genuine fruit of attachment and esteem.

Two years after this sanguinary statute he was deposed and murdered, and one of the first acts of his successor's reign was to repeal it. The words of the repeal deserve attention. "Item, "whereas, in the said Parliament, holden in the "said twenty-first year, of the said late king "Richard II. divers pains of treason were ordained by statute, in as much, that there was "no man which did know how he ought to be- "have himself, to do, speak or say, for doubt of "such pains.—It is accorded and assented, by the "king, lords, and commons, aforesaid; that in "no time to come, any treason be judged other- "wise than it was ordained by the statute in the "time of his noble grandfather king Edward III."

It seems then, that there had been departures from the act of Edward III. and those departures were by statute.

The only statute, passed in the twenty-first of Richard II. *ordaining divers new pains of treason*, was the one above-mentioned, and the only two kinds of this offence which it can be reasonably supposed to have introduced, are compassing to dethrone the king, and conspiring to levy war.

I have no difficulty in saying that both were referred to in the repeal; but certainly the last, which depends upon a much more strained construction, and is far more alien from the spirit and meaning of the act of Edward III. My lord Hale,* in commenting upon this statute, confines the reference to the last, and mentions it expressly as the principal point of variance from the act of Edward III. It is true, he mentions another, namely, that the statute of Richard II. did not require any overt act to make the compassings therein specified high treason. But this certainly does not appear on the face of that statute, and how a compassing can become the object of human knowledge, without an overt act of some kind or other alledged, is to me utterly incomprehensible.

But however this may be the taking away the necessity of an overt act to the conviction of the offender, cannot in propriety of language be denominated the ordaining of divers pains of treason, which are the words of the repealing statute. Such
a prin-

* H. P. C. v. 1. p. 111.

a principle, if it could be carried into practice, would indeed be well calculated to multiply accusations, by facilitating the means of conviction, but would not extend the number of treasons which the words of the repeal inform us was the grievance that called for redress.

Under this head of perpetual laws, I shall mention two bills of attainder, passed in the 29th of Henry the Sixth, against the celebrated Jack Cade. In both these, compassing the king's death is expressly confined to some act immediately levelled at the natural or political life of the sovereign; and in the first of them it is clearly distinguished from the act of levying war; for having specified certain deeds, which, in the opinion of the legislature, constituted treason under the clause of compassing, it proceeds in this manner—"And
" there and then waged and levied war falsely and
" traiterously against the king, and his highness."

The reader will observe, that no sooner does the parliament come to this part, than it immediately drops the particle of definition or description, (imagined the king's death and destruction *by* such and such acts) and takes up the conjunctive particle *and*, which implies accumulation and addition; that besides the said acts, he moreover levied war.

The

The overt deeds, which are supposed to constitute compassing, have all an immediate relation to the person of the sovereign, if not in his natural, at least in his political capacity; "that he gathered together, and levied a great number of persons, and excited them, d'ensurrer, to rise against the king, and against the royal crown and dignity of the king."

What is meant by rising against the king, and his royal crown and dignity, is fully explained in the second act, whereby we are informed, that the said offender had assumed royal power, and not only so, but legislative authority, taking upon himself to enact laws for the government of the kingdom, and causing indictments to be preferred against those who refused to acknowledge his usurped domination; insomuch, that parliament was obliged by this special act to rescind his laws, and declare, that all indictments preferred under the terrors of his power should be null and void, and of no effect.

In reality, this Cade not only compassed to depose the king, but actually deposed him, within the range of his mob-government, by an usurpation of the royal authority in his own person. This, upon the principle that compassing to depose the sovereign, is compassing his death, within the meaning of the statute of treasons (a principle equitable

table in itself, though perhaps, as I observed in a note, not very tenable in the way of construction, but at all events very different from that which I am opposing) was undeniably an act of traitorous conspiracy, which merited the penalties inflicted upon it by the above-mentioned bills of attainder.

I submit it, however, to every candid reader, who shall take the pains to turn to these statutes, whether it does not appear very evident, upon a fair and impartial perusal of them, that the bare act of conspiring to levy war was not apprehended by the legislature to fall within the scope of the treason laws. I confess, they impressed this conviction upon my mind. I have deduced the arguments which confirmed me in it. I leave them to the consideration of the judicious and the impartial.

In respect of judicial determinations, we have seen, in one of the passages quoted from Sir Edward Coke, that there had been a solemn one, at which the learned judge himself was present, in confirmation of my doctrine.

In the case of Sir N. Throgmorton,* in the reign of Q. Mary, it was decided, that if two or more conspire to levy war, and the conspiracy is carried into execution by one of them, this involves them all in the guilt of treason; a doctrine founded

* Dyer's rept.

founded on this special principle, that in treason there are no accessaries.

Now the prevailing rule of construction leads to this absurdity, that, supposing a number of persons to conspire to levy war, and the design is not executed by any one of them, then they are actually agents of treason. But if the conspiracy be carried into effect, those who did not join in the fact, though they joined in the steps which led to it, are only principals on a special rule, and have, in some respects, the character and advantages of accessaries; that, for instance, of not being tried till after the actual perpetrators of the deed. It requiring the application of a special rule to make them principals in the second supposed case, is to me a plain proof that they are not so in the first.

Thus far there is an harmonious consent of reason, analogy, authorities, and acts of parliament, in favour of the proposition for which I contend.

I come now to enquire, when this harmony was first broken, and a change effected in the doctrine of the law upon this subject. I have considered the point with some degree of attention, and I cannot carry back the period beyond the trials of the regicides soon after the restoration. Sir Matthew Hale* expressly refers to the determination

* H. P. C. v. 1. p. 121.

nation in this case, as the first judicial resolution, exclusively of those which had been cited to support it, and which I shall canvass when I come to examine the determination itself, of which they were made the ground-work.

In Layer's case, in the reign of George the First, Chief Justice Pratt, who presided at that trial, goes no further back in his enumeration of precedents, but relies on the case of the regicides in such a manner as to intimate, that it was the utmost point to which he could stretch the series. Now it is certain, that the precedents of those times should be weighed with many grains of allowance. The whole reign of Charles the Second is in no very good odour with the friends of liberty; and surely their opinions will run as strongly against the commencement as any other part of it, even the period immediately preceding its termination.

After a long interval of civil wars and tumults, in which, under the pretext of establishing liberty, every thing valuable and respectable in society had been destroyed, and a most grinding tyranny exercised upon the nation, the ancient monarchy was restored; and a party, exasperated by the recollection of its sufferings, and giddy with the joy of its triumphant re-establishment, found itself on a sudden invested with the plenitude

nitude of power, and in a condition to wreak its vengeance on its late oppressors. The people, whose character it is to start from one extreme to another, had become so tired of that mixed anarchy and despotism, which their own excesses had created, that, fearful of relapsing into it, they abhorred the very name of liberty, and were ready to lay all their ancient rights and privileges at the feet of their newly-restored sovereign.

The same spirit prevailed in both houses of parliament ; and we are assured, on the faith of contemporary historians, that had it not been for the virtuous moderation of two or three of the king's ministers, my Lords Clarendon and Southampton in particular, which refused to take advantage of the general frenzy in favour of the arbitrary power of their master, there is scarcely a barrier of our constitution which these degenerate lords and commons would not have sacrificed to the blind inconsiderate humour of the day.

While the minds of men were in such a state, while passion was the lord of the ascendant, and the cool sober spirit of constitutional jurisprudence was banished for the time, it is not surprising that judges and lawyers, who are seldom the last in any fashion which is favourable to their interests, should not be very delicate or scrupulous in respect of persons guilty, in the general
opinion,

opinion, of the most heinous of crimes, whom the sovereign had every motive of interest and just revenge to wish to have destroyed. It is not surprising that they should strain the law a little, in order to get rid of such obnoxious persons; that they should depart from the strict observance of forms, where the guilt was notorious, and the whole nation was ready to applaud the equitable punishment. But the very same causes which account for their conduct, may be allowed to detract in some degree from the authority of their decisions; particularly when we find that the fact corresponds to the theory, and that in several of their proceedings they were guilty of palpable admitted informalities. In the case of the regicides, which is the case that suggested these general reflections, the judges who were to try the cause, and the king's counsel who were to prosecute the criminals, met and consulted together, to form and fix the accusation; a circumstance, as Mr. Hungerford, in the case of L^ayer, observed, never practised before or since.

The decision on this occasion was confirmed not long after, in the case of the northern rebels, and the grounds of it more particularly opened. It was confirmed by nearly the same persons who had originally pronounced it; and it appears clearly, by the report of the transaction in Key-
ling,

ling,* who was one of the judges in the commission, that they were guided in the confirmation of it by the same motive of getting rid one way or other of obnoxious persons which had dictated it in the first instance.

The war had actually been levied in one of the ridings of Yorkshire; so that the first idea was to implicate those who had been guilty of conspiring only, on the general ground that there are no accessaries in treason: but then, it was feared that there would be a deficiency of evidence in proving the combination. They next intended to ground the indictment on the temporary act which had been passed the year before; but unfortunately for their purpose, this was confined to certain specific acts of conspiring, such as speaking and publishing; and however pliable an act of parliament in the hands of judges, they were seized with a sudden and unaccountable scruple, that it could not be extended to acts which the legislature appeared to have purposely omitted; so that, as a last resource, they must needs set up anew their own decision, and defend it as well as they can.

This proceeding puts one in mind of the pleasant conference between the three brothers in the Tale of the Tub, who being predetermined to wear shoulder-knots to their coats, were strangely at a loss to find any authority for such a fashion in
their

their father's will. They first tried the argument of *totidem verbis*; but, alas! no such words were to be found after the most laborious researches. The notion of *totidem syllabis* was then resorted to; but this proved equally inauspicious. They were lastly driven to *totidem litteris*, which, by a skilful evasion of the untoward letter *x*, they contrived to suit tolerably well to their purpose; and swaggered next day, says our author, in as large and flaunting shoulder-knots as the best.

I have already observed, that the decision in this case rests precisely on the same grounds as the one which preceded it in the trials of the regicides, so that in examining the one, we examine both. We have two reports of the resolution of the judges, one in Keyling, and another in Hale's *Pleas of the Crown*, taken from a manuscript of L. K. Bridgeman, who assisted at the conference. The judges take notice of the doctrine of Coke, but assert, that he has contradicted himself where he mentions the determinations in the cases of Lords Essex and Cobham.

Supposing the determinations to be as they would intimate, where is the contradiction? Lord Coke, in one place, gives you a solemn resolution of the judges coinciding with his own settled digested opinion, and in another occasional decisions, which, it is fair to conclude, from the proposition he expressly lays down, were regarded by him as of less authority, being contrary to principle, and the established rules of construction. But the fact is, the determination in either

of the cases referred to, proves nothing in favour of the doctrine attempted to be grounded upon them; in both, there appeared a settled design of imposing force and coercion on the sacred person of the sovereign.

This is evident beyond contradiction, in the case of the Earl of Essex, reported at length in the State Trials*. In both, the principle the judges proceeded upon, was this; that any attempt to destroy or controul, by personal violence, the constitutional independence of the supreme magistrate, is a constructive act of compassing his death; a principle, false, perhaps, but very different from that which the judges of Charles the Second attempted to wring out of them. They are both placed in this identical point of light, by a solemn resolution of all the judges, in the case of P. Harding†, in the reign of William and Mary; the same conclusion erected upon them; the same use made in respect of precedent and analogy. Dr. Storey's case is likewise brought to support the charge of inconsistency upon Coke as reported by Dier, (I do not know of any other report of it) it was this.—He conspired beyond sea to invade the kingdom with a great power; declared by what means the design could be effected; in what place the attempt should be made; and engaged for the co-operation of numbers immediately upon the landing. The persons with whom he conspired were alien enemies; this, therefore, was an overt act of adhering, if it had

* V. 1. p. 190, & post. It is no less so in the case of L. Cobham. Vid. an account of his conspiracy in Sir W. Rawleigh's trial. S. Try. v. 1. p. 205. & Rapin, v. 2. p. 161. He was even charged with an assassination-plot.

† Ven. part 2. p. 315.

been so laid in the indictment. But the question propounded to the judges was this: If the practising there be for the death or destruction of the king, what offence that is in the subject? These offences, says the reporter, are holden by the justices to be treason; "for an invasion with power cannot be, but of necessity it will trench to the destruction or great peril of the person of the prince."

But it is evident, that this is going much farther than the question required. The question is put hypothetically, and the supposition therein stated was in truth agreeable to the real case*, though the circumstance is not specified in the summary narrative of the reporter. Dr. Storey, then, had practised for the death or destruction of the queen.

This was the point immediately before the judges; and they were indisputably right in determining the offence treason. With respect to the matter of implication or construction, relative to invasions, or conspiracies to invade, in general, the subject was not before them; their resolution, therefore, has the authority only of an extra-judicial decision, and cannot countervail so many other authorities.

It is likewise to be remarked, that at the time when this treason was committed there was a pretender to the crown. The invasion was concerted with the servants of a power that supported the claims of this pretender. To dethrone the queen, then, must necessarily have entered into the plot, or might, at least, be implied, without any very strained construction.

* Storey practised with one Bestall, a conjurer, against the queen's life. Camb. p. 417.

The case may have taken a particular colour from this consideration, since the offence imputed was not merely a conspiracy to invade the kingdom, but a conspiracy to dethrone the sovereign by means of an invasion. This remark extends itself to all cases where conspiracies or compassings are entered into with persons claiming a title to the crown. It is certain, that such cases fall within the description of treason, by a scheme of reasoning much more simple and plausible than where this circumstance of aggravation does not occur; or to express myself more clearly and distinctly, a conspiracy to levy war, or invade the realm, in concert with a pretender, or in hostility to the title of the sovereign in possession, may be treasonable, and it will not follow from thence that conspiring to levy war, nakedly and abstractedly taken, will be so.

I must therefore think, that the analogy is not quite complete between precedents so circumstanced, and the cases that have arisen, or are likely to arise, in the present day. I do not admit the reasoning to have been perfectly just, even in respect of designs such as I referred to, because the fact, of aiming at the destruction of the sovereign in his natural or political capacity, constituting the gist of the charge, required to be distinctly and specifically proved, and should not have been raised by construction or implication, however plausible. All I would here insist upon is, that though there may be blamable sophistry on both the suppositions, it comes, at least, in a less questionable shape in the one than in the other.

These

These were the grounds on which the judges of Charles the Second established a doctrine rendered convenient by the circumstances of the times, but contrary to the most established rules of construction, and the highest authorities of law. They determined, at the same time, that an overt act, not laid in the indictment, might be given in evidence, and would be sufficient, if properly supported, to convict the criminal. This resolution my Lord Hale positively rejects, as in the highest degree iniquitous, yet delivering, in his summary*, an opinion conformable to that of Coke, on the subject of this essay, he contradicts it in his Pleas of the Crown†, on the sole foundation of the decision in this case, coming as it does in so very questionable a shape, and in such bad company.

Sir Matthew Hale is, then, at variance with himself. The only question is, which is most reasonable; to follow Sir Matthew Hale, when delivering the result of his own studies and reflection, or when condescending to transcribe a string of resolutions which, with all his disposition to acquiescence, he feels himself compelled to reject in part. The warmest admirers of that most excellent magistrate and learned lawyer will, I hope, not be offended with me, when I say, that I prefer him, with reason on his side, to with reason against him, particularly when the reason is his own, the error that of others. Even a tyrant did not resent the appeal which was made from Philip drunk to Philip sober.

Notwithstanding the authority of the resolu-

* Sum. p. 14.

† V. 1. p. 122.

tion above-mentioned, and the doubts of Hale, the doctrine of his Pleas of the Crown did not gain any thing like a firm footing till long after. I have already observed, that in the series of precedents and opinions, which commences with the time of Charles II. there is a considerable break and interruption.

Lord Holt, another luminary of our law, the brightest, perhaps, after the illustrious names of Coke and Hale, expresses himself, in the case of Sir J. Friend*, in a manner perfectly conformable to what I here contend for. He unequivocally admits, that the bare act of conspiring to levy war, is not treason. All that he presses, and what cannot be denied, is this, that supposing a design of violence on the sovereign, a conspiracy to levy war considered as collateral to it, or as a means of effecting this principal purpose, shall not take away from the treasonable guilt, which would attach to it, even without this accompanying circumstance.

Here, then, the warlike array designed, is to be viewed in no other light than as the tool or instrument with which the sovereign was to be assaulted. Whether the violence was to be open or secret, the violence of rebels, or of insidious conspirators, does not change the state of the question, any more than whether the engine of death were to be a sword or a pike, a dagger or a bowl of poison. Conspiring to levy war is at most a circumstance of aggravation, but does not constitute the gist of the charge. Designs against the person of the sovereign

* State Try. v. 4. p. 613. & 614.

sovereign must be specifically proved, or the indictment falls to the ground.

This I assert to be the doctrine of Sir J. Holt, a doctrine worthy of the constitutional judge, who did not hesitate to declare, that every hand might be armed against even an officer of justice, who should make any attempt upon the liberty of the subject not warranted by the law; for in such an attempt every Englishman shared in the injury, and might challenge a share in the revenge.

But notwithstanding this illustrious authority, the resolution of the judges of Charles II. was declared to be law by the judges of George I. In Laver's case*, the counsel for the prisoner insisted upon the opinion most favourable to their client, and offered to support it by argument; but they were stopped by the judges, in a tone of high authority, who, though very peremptory in their conclusion, were very lame in their premises. The case in Keyling was the only one which they cited, except a very recent determination of their own, in the case of Dorrel, Gordon, and Kerr, which they came to, they said, after a full discussion of the subject. Of the trial on which this decision was given, I have not been able to meet with any particular account. It appears only, that Mr. Ketelbey, one of the counsel assigned to Laver, had acted in the same capacity in that cause; by him the point had been argued, and we learn from himself, that he omitted mentioning the statute of the 13 of Elizabeth, which affords one of the strongest arguments in support of the opinion which he was employed to maintain.

The authority of these cases has given consi-

* State Trials, vol. 6. p. 327.

derable

derable prevalence to the doctrine which includes the crime of conspiring to levy war under the construction of the statute of treasons. It has been transcribed from one compilation to another, and, according to the forcible expression of Junius, what was fact yesterday has become law to-day. I would not be thought to entertain any general notions hostile to authority. No one has a more profound contempt for that presumption which would withdraw itself entirely from the dominion of illustrious and venerable names*. This is but the low pedantry of philosophy. It is a miserable trick of coxcombs to appear wise in the eyes of the vulgar. To the opinions of great men I look up always with reverence, generally with submission. But when the only question is, what does a plain piece of writing mean? and I

* Nothing is more common than for frivolous wits to rail at authority. They laugh outright if you mention to them the opinion of some great man, statesman, or philosopher, in support of a particular proposition; and yet, upon the strictest principles of reasoning, a correct understanding shall often assent to a great authority upon a doubtful point, rather than adopt the conclusion of its own enquiries concerning it. Let us consider this proposition; a republic is the best form of government. Alciphron reads and observes, and as the result of his reading and observation, is inclined to consider this proposition as true. Good and best are terms expressive of the general experience of mankind. By the criterion of experience, therefore, must this proposition be judged. Alciphron thinks experience is for it, but the balance inclines only by a very minute difference. He finds that Montesquieu is of a different opinion. Montesquieu was a man of unimpeachable integrity, and in the first order of human understandings. He considers the connection there is between the opinion of such a superior spirit as Montesquieu, and the truth of propositions. He observes that connection established by a body of experience, admitting of very few variations or exceptions. It is for him to weigh this body of experience, against that minute difference deduced from his own general survey, and which, in his apprehension, turned the scale in favour of a republic. If he finds the latter kick the beam, in strict reasoning and sound logic, his sentiments should conform to the authority of Montesquieu.

have

have the writing before my eyes, I must be allowed to judge of it in some measure by my own understanding. I cannot, at least, by any effort of credulity bring myself to reject its clearest and best-weighed suggestions. Still I am not satisfied, if I am obliged to rest here. My reason against authority is not a situation of mind which fills me with pride, but rather with diffidence and suspense. I willingly escape from the sense of my own weakness, to the shelter of great and respected names. This is a consciousness which I can indulge in the present argument. I have the highest authorities of law ranged on my side.

Modern opinions are, indeed, against me; but I look upon them as a mighty weight tremblingly vibrating on a single point; and I have only to consider the adequacy of that point to support that weight. On the determination in *Keyling* the whole doctrine rests. From this you must set out in your journey forwards; this must terminate your researches backwards. *Foster* cites *Keyling*, and *Blackstone* *Foster*. If *Keyling* was wrong, all the others must be wrong likewise. No strength of authorities can prevail against an act of parliament, certainly, not authorities of so recent a date, and building upon so rotten a foundation. *Brutus*, or *Manilius*, may be against me; but in the words of *Cicero*, and my motto, *Scævolæ & Testæ assentior*.

I flatter myself that I have fulfilled my undertaking with the reader. I have traced the old and new doctrine through, nearly, all the cases, authorities, and decisions which have occurred respecting either. I
have

have shewn how the question stands on the ground of general principle, and reasonable induction; and when I was on the point of concluding, I was stopped by a most dangerous doctrine, which is continually rung in our ears by the low retainers of ministry, and echoed by all the fools and thoughtless coxcombs in the nation; a doctrine which has its foundation, not in any general principle of law, or reason, or policy, but in the personal characters, and personal circumstances of the unfortunate individuals accused: Hang them, they are a parcel of rascals, and the sooner they are got rid of the better. I shall not dispute the premises with these judicious gentlemen, because, being utterly unacquainted with the persons in question, I have no means of ascertaining the truth, or demonstrating the falsehood of the general imputation. I must content myself, therefore, with entering my humble caveat against the conclusion deduced from it. I have always been fond of study, and particularly of the study of history. This has led me to remark, that never did any tyranny establish itself among the sons of men, which did not begin with some plausible pretext, or some name musical to the ears of the vulgar. It either strutted in the proud robes of liberty, or assumed the demure precise demeanor of public order. But whatever disguise it put on, the first victims of its power were always men generally obnoxious; in respect of whom the irregularity of the proceeding was excused in the apparent equity of the sentence.

Without going back to the tyrants of Athens, or tracing the long line of blood through the Syllas and Octavius's

Octavius's of antiquity, or the Henry the Eighth of modern times, can we so soon forget the celebrated exclamation of Barnave, when the murder of Berthier and Foulon was announced to the constituent assembly of France—*Ce sang est il donc si pur?* Little did that young declaimer imagine that he was then establishing a principle, of which he himself was by woeful experience, to feel the dangerous consequence. Away with those idle effusions of a meretricious rhetoric, which blind the judgment, while they incite the passions. Let us, in the calmness of sober truth, endeavour to trace out the great leading cause to which all the massacres and convulsions of a neighbouring country are to be ascribed. I think they will be found so many ramifications from this infernal principle, that the rectitude of an end sanctifies every means that is taken to attain it; and that the ordinary forms of justice are to be superseded, whenever the presumption of man thinks proper to pronounce that the ultimate good is likely to overbalance the evil of the temporary deviation. It ought to impress, with a salutary terror, the firmest advocates for this fatal doctrine, that extra-judicial proceedings once set a-foot, have generally turned to the destruction of their authors, and that the abuse of a sacred name has been found the most effectual means of extinguishing the thing which it represents. Despotism has lighted his torch at the vestal fires of liberty, and licentiousness has borrowed her weapons of destruction from the armoury which was intended for the general defence.

Would you, O my countrymen, preserve the happy
state

state which you have so long enjoyed, adhere with religious strictness to the maxims and institutions of your canonized fathers. Oppose the spirit of licentious innovation, whatever name it assume, whatever shape it appear in, from whatever quarter it may come. Remember that the angel of darkness, we are told, has often put on the appearance, and counterfeited the smooth faintly language of a minister of grace. Shut your ears against those deceitful counsellors who would have you be disorderly in defence of order, and violate the laws in support of their authority. They present to you the horrid, ghastly image of licentiousness, in all the exaggerations of caricature, with a view of frightening you into despotism. But impress upon your minds this momentous truth, which the whole course of historical experience uniformly attests, that despotism is licentiousness, and licentiousness is despotism. They are fundamental invariable laws in our human system, wisely ordained by the great contriver of this and every other system of being, that the power which knows no bounds shall know no security; that the prince who violates the laws against his subjects, shall teach them to violate them against him; that if he extends his pretensions, they will enlarge their claims; and when once the established system of law and usage is broken up, and the boundaries of right and wrong become undeterminate, to-day the sovereign may be upward, and congratulate himself on the success of his schemes; but the vortex which he has set in motion, shall whirl him down, and sink him, perhaps for ever.